October 17, 2019

Notice of Ex Parte

Marlene Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Connect America Fund: Performance Measures for Connect America High-Cost Universal Service Support Recipients***
Docket No. 10-90; DA 17-1085

Dear Ms. Dortch:

Yesterday, Michael Romano, Senior Vice President of Industry Affairs & Business Development, and the undersigned, on behalf of NTCA–The Rural Broadband Association (NTCA), met separately with Preston Wise of the office of Chairman Ajit Pai, Travis Litman of the office of Commissioner Jessica Rosenworcel and William Davenport of the office of Commissioner Geoffrey Starks to discuss the above-captioned docket. NTCA expressed its appreciation for the pre-testing and testing schedule and structure, and, consistent with its prior filings in the docket, reiterated its support for the usefulness of network testing. NTCA nevertheless commended the Commission to continue to ensure the protocols can be implemented in ways that are both administratively and economically equitable and efficient. NTCA highlighted specific examples in this regard.

End Points for Testing

In the first instance, NTCA discussed the requirement for providers to test from the customer premises of an active subscriber to a remote test server located at or reached by passing through a Commission-designated IXP.[1] In initial comments, its *Application for Review and Request for Clarification*, and various *ex parte* presentations filed in this proceeding, NTCA has explained why only those portions of the network that are actually supported by universal service funds and under the control of the operator should be subject to testing. NTCA explained that although a rural provider may have purchased sufficient capacity and deployed adequate facilities, its ability to meet testing obligations relies at least in part upon the performance of a third-party middle

[1] *Connect America Fund: Order on Reconsideration,* Docket No. 10-90, FCC-CIRC1910-01, at para. 12 (2019) (Draft Reconsideration Order).

mile provider.[2] Addressing the *Performance Measures Order*[3] specifically, NTCA explained that (1) small providers fundamentally lack the bargaining power the *Performance Measures Order* conjectures they possess, and (2) *arguendo* a small provider could obtain reasonable and affordable results with the transport provider, the small provider in all events would have no actual control over events beyond its network and, at best, the next-tier network from which it procures capacity directly.[4] In a subsequent presentation, NTCA suggested additional alternatives, and illustrated the suitability of testing to the next-tier provider.[5]

Adding to the potential difficulty of testing is the residual ambiguity of the revised definition of an FCC-designated IXP in the *Draft Reconsideration Order*. The draft provides, "an FCC-designated IXP . . . [is] any building, facility, or location housing a public Internet gateway that has an active interface to a qualifying ASN."[6] NTCA explained that a series of discussions with technical experts and engineers has not yielded a consistent understanding of the definition. NTCA acknowledges the relative difficulty of distilling highly technical ideas to paper but emphasizes that the stakes of risked high-cost support are too high to solidify a final decision in the absence of clear industry understanding of the testing parameters. Accordingly, NTCA submits that, at the very least if the Commission will not revert to the proposals submitted by NTCA for testing end points, the Commission should delegate to the Bureau the authority to clarify and refine further this definition of IXP based upon technical consultations and evidence, and that any subsequent industry inquiries or requests for amendment that may respond to such subsequent clarification be insulated from being categorized as untimely petitions for reconsideration or clarification.

Overall, however, *any* definition that places the endpoint of the test beyond a network segment owned or controlled by a small provider is facially inequitable. The *Draft Reconsideration Order* provides no evidentiary basis for the summary conclusion that smaller operators can dictate terms like service quality in dealing with much larger national or even regional transport providers that are far upstream. Specifically, the *Draft Reconsideration Order* states, "As the Bureaus explained, carriers – even small ones – do have some influence and control over the type and quality of Internet transportation they purchase."[7] In support of this statement, the *Draft*

---

[2] *Connect America Fund: Performance Measures for Connect America High-Cost Universal Service Support Recipients: Comments of NTCA–The Rural Broadband Association,* Docket No. 10-90, DA 17-1085, at 9-11 (Dec. 6, 2017).

[3] *Connect America Fund: Order,* Docket No. 10-90, 33 FCC Rcd 6509, at para. 12 (2018) (*Performance Measurement Order*).

[4] *Connect America Fund: Performance Measures for Connect America High-Cost Universal Service Support Recipients: Application for Review and Request for Clarification of NTCA–The Rural Broadband Association,* Docket No. 10-90, DA 17-1085, at 3 (Sep. 19, 2019).

[5] *Connect America Fund: Performance Measures for Connect America High-Cost Universal Service Support Recipients: Ex Parte Presentation of NTCA–The Rural Broadband Association,* Docket No. 10-90, DA 17-1085 (Feb. 28, 2019).

[6] Draft Reconsideration Order at para. 19.

[7] Draft Reconsideration Order at para. 15.

Reconsideration Order cites the July 2018 *Performance Measures Order,* which posited, ". . . the carrier can influence the quality of transport purchased and can negotiate with the transport provider for a level of service that will enable it meet the Commission's performance requirements. This is true for both price carriers and smaller carriers."[8] The Bureau based that finding on a similar conclusion of the *CAF Phase II Price Cap Service Obligation Order*, which stated:

> . . . while a price cap carrier . . . may not have direct control over any middle-mile or transit providers with which it connects, it does have influence . . . [it] can compare the quality of service offered by transit providers and select one with a higher quality of service . . . the last-mile provider can improve its latency by purchasing additional capacity . . . .[9]

NTCA therefore once again urges the Commission to provide reasonable flexibility and recognize the concerns faced by smaller providers as it defines what it means to test to Commission-designated IXPs. NTCA also discussed the value of a "safe harbor," which would contemplate the establishment of industry-identified standards for purchasing middle mile capacity. Under such a safe harbor, a provider that purchased sufficient capacity and entered into reasonable arrangements to ensure service of a compliant service would be accorded a presumption of compliance if it could demonstrate that an event or events that caused a test failure occurred outside of the network segments that it owns or controls.

Remedies for Non-Compliance

The *Draft Reconsideration Order* states, "at the conclusion of a carrier's buildout term, any failure to meet speed and latency requirements will be considered a failure to deploy."[10] The structure of the rule, however, appears to establish to what amounts as "double jeopardy" under certain circumstances. As explained in the remainder of the paragraph and as elucidated in the relevant footnotes,[11] a carrier that fails to meet requisite speed and latency requirements will be penalized for not achieving performance metrics. Moreover, any location that does not achieve performance metrics will also not be counted as a "deployed" location, thereby subjecting the provider to a second penalty (the first for not meeting performance metrics, the other for not deploying).

Footnote 183 of the *Draft Reconsideration Order* illustrates this concerning approach with the following example: if a carrier that is required to deploy to 100 locations deploys to only 90, it

---

[8] July 2018 Order at para. 19 (internal citation omitted).

[9] *Connect America Fund: Report and Order,* Docket No. 10-90, 28 FCC Rcd. 15060, at para. 32 (2013) ("Further, while a price cap carrier accepting Phase II model-based support may not have direct control over any middle-mile or transit providers with which it connects, it does have influence over its transit providers. For example, a last-mile provider can compare the quality of service offered by transit providers and select one with a higher quality of service. In addition, the last-mile provider can improve its latency by purchasing additional capacity from the transit provider or by negotiating a SLA.") This finding is unattributed.

[10] *Draft Reconsideration Order* at para. 69.

[11] *Draft Reconsideration Order* at fn. 182, 183.

will be scored with a shortfall of 10 locations. If of the 90 "actually built" locations, nine fail to meet performance obligations, then those nine will combine with the ten "missing" locations to a sum of 19 locations that fail to meet performance obligations (nine in actuality, and ten virtually). But rather than assess penalties based upon only 19 "non-performing locations," the *Draft Reconsideration Order* then also assesses an additional penalty for 10 locations not actually built for a total of 29 penalized locations. In total, the *Draft Reconsideration Order* assesses a penalty for not building a location . . . and then adds atop that another penalty for the same location as if the non-existing location failed to meet performance obligations. This outcome begs for revision to ensure that a single location, whether built or unbuilt, will not be subject to multiple sets of penalties.

The scope of those penalties, as well, presents concerning inconsistencies. In the first instance, the *Draft Reconsideration Order* indicates that *any* performance failure will be construed as an unbuilt location. If that is the case, then a location that misses a test by the slenderest of margins would be cast to the same fate as a location that fails by a broad measure; each would trigger a significant penalty while only *one* presented a significant consumer impact. Additionally, the reverse-extrapolation contemplated by the *Draft Reconsideration Order* conjures a disproportionately punitive impact. As explained the *Draft Reconsideration Order,* if 10 percent of a carrier locations fail performance tests, then the provider will forfeit (among other penalties) "10 percent of the carrier's total relevant high-cost support over the support term for that state."[12] Under this scenario, a 10,000-line provider would lose 10 percent of support for testing that failed in a mere 0.05% of its locations. NTCA acknowledges the usefulness of statistical samplings and the value of extrapolation where assessments of conditions beyond the actually-observed data set must be made, but nevertheless submits that the disproportionate risk occasioned by this structure could inject significant risk into the efforts by small providers to obtain capital for investment. Accordingly, NTCA (and in accordance with its prior filings in the docket) commends the Commission to view failed tests as "red flags" that invite the provider to demonstrate why a test failed before an automatic reduction in support is administered, and to develop a more nuanced approach that avoids broad-stroke applications of extrapolated penalties.

Finally, and as explained by NTCA, numerous questions surround the curative "retests" described in the *Draft Reconsideration Order.* For example, are those locations counted within or outside of the next 50 randomly selected locations? Or, is a location that fails a test by *any* margin considered unbuilt into perpetuity? Or, is it the case that each test allows a change to cure and reset compliance, such that in effect only the "final" test matters after all of the prior retests and refunds – and will there be no reasonable opportunity to cure any failures that happen to arise in that final test? As described above in relation to the IXP questions, complexity and ambiguity in the implementation of these requirements could have a disproportionate effect on smaller operators in particular. If such issues cannot be addressed, clarified, and reconciled in the order itself, special care and additional processes should then be contemplated to enable adjustments that are found later to be necessary as testing requirements are implemented.

Consumer Consent

NTCA also notes that consumer consent issues may yet exist where software-based testing solutions are implemented. Specifically, these will yet exist where the *current* customer

[12] Draft Reconsideration Order at para. 69.

equipment is incapable of supporting the software-based solution and would require replacement. Moreover, this issue may be of particular concern where the subscriber uses a customer-owned, rather than provider-provided, device. Without discounting the conclusion that certain customer consent issues are mitigated by relying upon a software-based solution, NTCA nonetheless maintains that the rules should contemplate the impact of consumer perceptions of new, test-capable devices installed at their premises.

Thank you for your attention to this correspondence. Pursuant to Section 1.1206 of the Commission's rules, a copy of this letter is being filed with ECFS.

Respectfully submitted,

/s/ *Joshua Seidemann*
Joshua Seidemann
Vice President of Policy

cc: William Davenport
Travis Litman
Preston Wise